

## DEPARTMENT OF INDUSTRIAL RELATIONS

Office of the Director

455 Golden Gate Avenue, 10<sup>th</sup> Floor

San Francisco, CA 94102

Tel: (415) 703-5050 Fax: (415) 703-5058

MAILING ADDRESS:

P. O. Box 420603

San Francisco, CA 94142-0603



**TO:** Awarding Bodies, Approved Labor Compliance Programs, and other interested persons

**FROM:** Christine Baker, Acting Director  
Department of Industrial Relations

**DATE:** July 1, 2011

**SUBJECT:** Notice of discontinuance of Private Third Party Labor Compliance Programs and Grandfathering of Those Approvals to Awarding Bodies That Currently Have Contracts with Approved Private Third Party Programs

---

Following a policy decision announced in 2009, this Department has stopped accepting applications for approval of private third party labor compliance programs (LCPs). The purpose of this notice is to inform you of the discontinuance of separate approvals for private third party LCPs, effective as of **September 1, 2011**. In order not to jeopardize the status of awarding bodies that have contracted with approved private programs to meet requirements of Labor Code section 1771.7 (AB1506) or another statute, I will also be “grandfathering” those private program approvals to the awarding bodies that have existing contracts with the private LCPs. Thereafter, this Department will only be granting approvals to awarding body programs, whether those programs use in house staff, outside entities or consultants, or some combination of in house staff and outside entities or consultants.

The following sections of this announcement provide information on the background behind this policy change, the relationship between this action and the CMU, the timetable and procedures for converting private program approvals to awarding body approvals, and where to go for additional information.

**Background:** In our most recent amendments to the Labor Compliance Program regulations, we eliminated former subsection (c) of 8 Cal. Code Reg. section 16421, which contained the only reference to *private* third party programs. Our reasons for doing so were expressed in the Initial Statement of Reasons, in part, as follows:

“The reasons for deleting this subpart are based on the lack of any statutory or regulatory imperative to separately approve private entities to perform [the LCP] function and the desire to eliminate issues that have arisen in connection with the separate approval of private entities. In particular, Labor Code Section 1771.5 authorizes the establishment of LCPs with specified prevailing wage monitoring and enforcement responsibilities to be performed by or on behalf of awarding agencies. Other statutes that require the use of LCPs on specified projects, such as

To: Awarding Bodies, Approved Labor Compliance Programs, and other interested persons

Subject: Discontinuing Approvals of Private Third Party LCPs and Grandfathering of Those Approvals to Awarding Bodies With Existing Contracts

Page 2

---

Labor Code Section 1771.7, also express this requirement as an obligation of awarding agencies that may either be performed in house or contracted for through a third party. The state's interest in approving LCPs is to ensure that the monitoring and enforcement responsibilities of awarding agencies under Labor Code Section 1771.5 and related regulations are carried out properly. This interest is the same regardless of whether the awarding agency uses in house staff or contracts with a separate entity to perform these functions. Under existing law, the state has no distinct regulatory interest in approving private entities to carry out these responsibilities, since the responsibilities ultimately belong to awarding agencies as governmental agencies performing governmental tasks, and private entities cannot exercise such governmental authority independently.

\* \* \*

“The necessity for deleting subpart (c) is to eliminate the implied authority to approve and any implied claim of right by private entities to be approved as LCPs. The deletion will not change the right of awarding agencies to contract with third parties, including private third parties, to meet statutory LCP requirements. However, the Director's regulatory authority will focus on the responsibility of awarding agencies, consistent with the underlying statutes.”

This proposal drew only two comments during the rulemaking process, and subsection (c) was deleted when the final rules were adopted and became effective on August 1, 2010.<sup>1</sup> Although the Department's Compliance Monitoring Unit (CMU) regulations that were adopted at the same time were later suspended from operation, most of the LCP regulatory amendments that went into effect on August 1, 2010, were *not* suspended and remain in effect.

After the regulatory amendments went into effect, the Director stopped accepting, and with one exception, stopped approving private third party programs.<sup>2</sup> It is now time to take the next step by ending the existing approval of private programs and grandfathering those approvals over to awarding bodies, so that no awarding body will have its bond-funding or other statutory authority for an existing project placed in jeopardy. Thereafter, any awarding body that is required by statute to have an approved LCP, will need to apply for and obtain approval for its own (*i.e.* the awarding body's own) LCP, although it may still follow the model of contracting with outside

---

<sup>1</sup> The Initial Statement of Reasons, in which the language quoted above appears, and the Final Statement of Reasons, which includes a summary of the public comments on the proposals and Director's responses to those comments, are among the rulemaking documents posted on the Department's website at <http://www.dir.ca.gov/LaborComplianceRegulations/LCP-SBX2-9.htm>.

<sup>2</sup> The exception was for a program that had submitted its application long before the effective date of the amendments.

To: Awarding Bodies, Approved Labor Compliance Programs, and other interested persons

Subject: Discontinuing Approvals of Private Third Party LCPs and Grandfathering of Those Approvals to Awarding Bodies With Existing Contracts

Page 3

---

persons or entities for these services, in which case the qualifications of those outside persons or entities will be factored into the approval decision.<sup>3</sup>

Relationship Between This Action and Suspension of CMU: Although some have questioned whether DIR should be taking this action now while the operation of the CMU remains suspended, there is no relationship between the two decisions. DIR had evaluated this issue and believes the correct interpretation of the Labor Code suggests that LCPs always should have been viewed in this way. DIR started approving private LCPs back in early 2003, with the intent of expediting the ability of school districts to qualify for Proposition 47 funding, but without fully analyzing the legal rationale or potential ramifications. This Department's only regulatory interest with respect to the approval of LCPs is to ensure that awarding bodies meet their obligations as governmental agencies to monitor and enforce compliance with the state's prevailing wage laws, regardless of what modalities those agencies use to carry out their responsibilities. Conversely, DIR has never been given authority to oversee or regulate a private LCP marketplace or industry.

Timetables and procedures: DIR has already stopped taking new applications for approval from private third party administrators. As soon as the necessary changes can be made, there will no longer be a separate listing of approved private third party programs on DIR's website. This will *not* change the status of those programs pending the completion of the other steps listed below; it only means that DIR will change how the information is displayed.

As soon as possible and by no later than **August 1, 2011**, approved private third party programs should provide a list of all awarding bodies with which the program has an existing contract to provide LCP services. The list should provide the following information: (1) name of Awarding Body, (2) name, title, and contact information for Awarding Body representative; (3) beginning and ending dates of contract; (4) public works projects covered by the contract; (5) any limitations on the LCP services being provided if the program is *not* handling all aspects of LCP work under 8 CCR sections 16421 – 16439; and (6), if known, the state statute (or statutes if more than one) that requires the Awarding Body to have an LCP for the projects covered by the contract. *Please note* that it is only necessary to include contracts and projects that are for purposes of complying with a state statute that requires the awarding body to have an LCP that meets the requirements of Labor Code section 1771.5. This Department does not regulate or approve LCPs for purposes of monitoring or enforcing compliance with federal or local laws, ordinances, or contract requirements, for voluntary compliance monitoring activities, or for contract administration or other activities that do not involve the enforcement of state prevailing wage requirements under state law.

---

<sup>3</sup> An awarding body that contracts out its LCP responsibilities should also be aware that it may be ineligible for waiver of CMU fees once those fee requirements go into effect. This is a limitation imposed by the fee statutes, including Labor Code sections 1771.55(c), 1771.75(a), and others, and not something the Department can ignore or modify by regulation or policy decision.

To: Awarding Bodies, Approved Labor Compliance Programs, and other interested persons

Subject: Discontinuing Approvals of Private Third Party LCPs and Grandfathering of Those Approvals to Awarding Bodies With Existing Contracts

Page 4

---

This information should be sent by letter, fax, or e-mail to the following location:

DIR, Office of the Director  
Attn.: Victor Osorio, LCP Program Analyst  
455 Golden Gate Avenue, 10th Floor  
San Francisco, CA 94102  
Fax: 415/703-5058  
E-mail: [vosorio@dir.ca.gov](mailto:vosorio@dir.ca.gov)

On **September 1, 2011**, all existing private third party program approvals will be “grandfathered” over to the Awarding Bodies with whom those programs have existing contracts; that is, the Awarding Bodies will be shown as having approved LCPs, subject to any applicable limitations such as for particular projects only, and also subject to the understanding that awarding body’s program will continue to rely on the outside entity for LCP services until the contract expires or this Department receives notice of a different arrangement.

On or after **September 1, 2011**, an Awarding Body will need to seek approval of an LCP in its own name if (1) it is required by statute to have an approved LCP but currently does not have one, *or* (2) it already has an approved program but is making significant changes in staffing or scope of operations that go beyond any restrictions in the existing approval. If the Awarding Body is only using an LCP for specific projects, it will also need to notify the Department of any new projects for which the LCP will be used. If the Awarding Body will be relying on outside staffing and manuals that previously were approved by this Department, we anticipate being able to review and approve those applications or modifications on an expedited basis, *unless* we have specific concerns over issues such as how the outside staff has been carrying out its existing LCP work or its capacity to take on additional work.

*Annual reports* covering the period from July 1, 2010 through June 30, 2011, will be due for *all* approved programs by no later than **August 31, 2011**. Annual reports should be filed for Awarding Bodies *only*, using the LCP-AR1 or LCP-AR2 form as appropriate.

...

If you have any questions regarding this notice, please direct them to Victor Osorio, Program Analyst at [vosorio@dir.ca.gov](mailto:vosorio@dir.ca.gov) or (415) 703-5054. Additional information and resources for LCPs is available on our web site at <http://www.dir.ca.gov/lcp.asp>.